

BRB No. 03-0820

CHARLOTTE I. PATTERSON)	
)	
Claimant-Respondent)	
)	
v.)	
)	DATE ISSUED: <u>Aug 30, 2004</u>
NEWPORT NEWS SHIPBUILDING AND)	
DRY DOCK COMPANY)	
)	
Self-Insured)	
Employer-Petitioner)	DECISION and ORDER

Appeal of the Supplemental Decision and Order of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Charlene Parker Brown (Montagna Breit Klein Camden, L.L.P.), Norfolk, Virginia, for claimant.

Christopher R. Hedrick (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Supplemental Decision and Order (2002-LHC-1901) of Administrative Law Judge Richard K. Malamphy rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with law. *See Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant, a shipbuilder, suffered an injury to her right knee on January 25, 2001. Employer paid claimant temporary total disability benefits from July 10 to October 14, 2001, October 19 to November 11, 2001, and November 13 to December 21, 2001. Claimant thereafter sought permanent partial disability benefits for a 14 percent leg impairment. Employer countered that claimant's impairment was seven percent. An

informal conference was held on April 23, 2002, after which the district director recommended that employer pay benefits for a 12 percent impairment. Thereafter, claimant also sought benefits for an additional period of temporary total disability from December 22, 2001 through January 1, 2002.

Employer did not take any action immediately after the informal conference, and the case was transferred to the Office of Administrative Law Judges on May 13, 2002, at claimant's request. On June 5, 2002, employer sent proposed stipulations to claimant, agreeing to pay claimant a schedule award for a 12 percent leg impairment and the additional temporary total disability sought by claimant, in exchange for claimant's agreeing to the stipulations. Employer also filed a Form LS-208, Notice of Final Payment or Suspension of Compensation Payments, on which employer stated that it paid claimant the additional temporary total disability benefits sought, and permanent partial disability benefits for a 12 percent impairment. On July 15, 2002, claimant's counsel informed the administrative law judge that the parties had resolved the issues between them and requested that the case be remanded to the district director. The administrative law judge issued an order on August 1, 2002, remanding this claim to the district director.

Subsequently, claimant's attorney filed a fee petition seeking \$1,811.20 in legal fees and services, representing 11.7 hours of attorney services at \$160 per hour and .50 hours of paralegal services at \$80 per hour. Employer filed objections to this request, contending that it cannot be held liable for an attorney's fee after claimant received the notice of final payment on June 9, 2002, because claimant did not obtain additional benefits after that date. Employer also objected to the requested hourly rate of \$160. In his Supplemental Decision and Order, the administrative law judge addressed employer's objections and awarded claimant a fee of \$1,611.20, representing 9.82 hours of attorney services at \$160 per hour and .50 hours of paralegal services at \$80 per hour.

Employer appeals, contending that the administrative law judge erred in holding it liable for an attorney's fee for services performed after it paid claimant compensation, as claimant did not obtain any additional compensation after June 6, 2002. Employer further contends that any fee for work counsel spent "winding up" the case should be minimal, and that the administrative law judge's fee award is excessive. Claimant responds, urging affirmance of the administrative law judge's fee award.

Under Section 28(b), 33 U.S.C. §928(b), when an employer voluntarily pays or tenders benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that paid or tendered by employer. *See, e.g., Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003). In the instant case, employer voluntarily paid temporary total disability benefits, and claimant sought additional temporary total and permanent partial disability benefits. After the case was

transmitted to the administrative law judge on May 13, 2002, employer paid additional benefits. Thus, pursuant to Section 28(b), employer is liable for an attorney's fee for services performed before the administrative law judge.¹ See *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *Savannah Machine & Shipyard Co. v. Director, OWCP*, 642 F.2d 887, 13 BRBS 294 (5th Cir. 1981). Employer, therefore, can be held liable for a fee for services rendered by claimant's counsel to "wind-up" the case. See *Everett v. Ingalls Shipbuilding, Inc.*, 32 BRBS 279 (1998), *aff'd on recon.*, 33 BRBS 38 (1999); *Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995).

The administrative law judge found that all services performed after July 9, 2002, save those relating to the fee petition, are the liability of employer, because the parties did not finalize the stipulations associated with employer's payment until July 15, 2002. Supp. Decision and Order at 4. We affirm this finding, as the administrative law judge rationally found that counsel had to continue to prepare claimant's case until the stipulations were finalized.² See generally *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989); *Waganer v. Alabama Dry Dock & Shipbuilding Co.*, 17 BRBS 43 (1985). Contrary to employer's contention, claimant was permitted to prepare for issues that were not presented to the district director at the informal conference as new issues may be raised before the administrative law judge. See 20 C.F.R. §702.336. Claimant is entitled to receive a fee for any necessary work performed in this regard. *Boland Marine & Manufacturing Co. v. Rihner*, 41 F.3d 997, 29 BRBS 43(CRT) (5th Cir. 1995). As the administrative law judge fully addressed employer's objections to the requested fee, and as employer has not established on appeal that the administrative law judge abused his discretion in finding most of counsel's services necessary, we affirm the awarded fee.

¹ As this case involved an actual payment of additional compensation, as opposed to a "tender" of compensation, we need not address the parties' contentions concerning the validity of any "tender." See *Jackson v. Newport News Shipbuilding & Dry Dock Co.*, __ BRBS __, BRB No. 03-0629 (June 15, 2004); see also *Hitt v. Newport News Shipbuilding & Dry Dock Co.*, __ BRBS __, BRB No. 03-0711 (July 7, 2004).

² See, e.g., Employer's pre-hearing statement dated July 18, 2002. In addition, counsel's fee petition states that she received interrogatories on June 27, 2002.

Accordingly, the administrative law judge's Supplemental Decision and Order awarding attorney fees is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge